

LYNDA BARRERA, individually,) 2:09-cv-02289-ECR-PAL
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Plaintiff,)
)
vs.) **Order**
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WESTERN UNITED INSURANCE COMPANY,)
dba AAA NEVADA INSURANCE COMPANY,)
a California corporation; DOES I)
through X, inclusive,)
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Defendant.)
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1 Claims Practices Act, and (3) bad faith. On December 2, 2009,
2 Defendant removed the action to this Court on the basis of diversity
3 jurisdiction. (Notice of Removal (#1).)

4 On February 2, 2012, this Court issued an Order (#106) granting
5 summary judgment on Plaintiff's causes of action for Violation of
6 the Unfair Claims Practices Act and for bad faith. The only
7 remaining claim is Plaintiff's breach of contract claim.

8 On February 16, 2012, Defendant filed a Motion for Attorney's
9 Fees (#109). On March 12, 2012, Defendant filed a Motion for
10 Judgment (#116) pursuant to Federal Rule of Civil Procedure 54(b)
11 while the breach of contract claim was outstanding. On April 11,
12 2012, the parties filed a Stipulation and Order for Dismissal with
13 Prejudice (#122), requesting that Plaintiff's breach of contract
14 claim be dismissed with prejudice, with each of the parties to pay
15 their own attorney's fees and costs incurred as relates to the
16 breach of contract claim only. Because no claims remain in the
17 case, judgment shall be entered, and Defendant's Motion for Judgment
18 (#116) pursuant to Rule 54(b) is moot.

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II. Legal Standard

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Fed. R. Civ. P. 54 establishes the procedure for recovering
22 attorney's fees. A motion for attorney's fees must "specify the

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judgment and the statute, rule, or other grounds entitling the

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movant to the award." Fed. R. Civ. P. 54(d)(2)(B)(ii). A party

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moving for attorney's fees must therefore assert an independent

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source of authority for an award. MRO Commc'ns, Inc. v. Am. Tel. &

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Tel. Co., 197 F.3d 1276, 1281 (citations omitted).

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1 In an action where a district court is exercising its subject
2 matter jurisdiction over a state law claim, so long as "state law
3 does not run counter to a valid federal statute or rule of court,
4 and usually it will not, state law denying the right to attorney's
5 fees or giving a right thereto, which reflects a substantial policy
6 of the state, should be followed." Alyeska Pipeline Serv. Co. v.
7 Wilderness Soc'y, 421 U.S. 240, 259 n.31 (1975) (quoting MOORE'S
8 FEDERAL PRACTICE § 54.77[2] (2d ed. 1974)).

9 Under Nevada law, the court may award attorney's fees if it
10 finds that a claim, counterclaim, or defense was brought without
11 reasonable ground or to harass the prevailing party. NEV. REV. STAT.
12 § 18.010. In addition, a prevailing defendant is entitled to
13 recover attorney's fees if an offer of judgment is rejected.
14 Specifically, Nevada law provides that a defendant may be awarded
15 reasonable attorney's fees incurred from the time of an offer of
16 judgment if the plaintiff rejects it and fails to receive a more
17 favorable result. See NEV. REV. STAT. § 17.115(4)(d)(3). In this
18 situation, Nev. Rev. Stat. § 17.115(4)(d) provides that a court
19 "[m]ay order the party to pay to the party who made the offer . . .
20 (3) Reasonable attorney's fees incurred by the party who made the
21 offer for the period from the date of service of the offer to the
22 date of entry of the judgment." Likewise, Nev. R. Civ. 68(f)
23 provides as follows: "If the judgment finally obtained by the
24 offeree is not more favorable than the offer, the offeree shall . .
25 . pay the costs and attorneys' fees, if any be allowed, of the party
26 making the offer from the time of the offer."

1 The Nevada Supreme Court has issued the following standard to
2 guide courts in determining whether attorney's fees are warranted
3 under Nev. R. Civ. P. 68:

4 In exercising its discretion regarding the allowance of
5 fees and costs under NRCP 68, the trial court must
carefully evaluate the following factors:

6 (1) whether the plaintiff's claim was brought in
7 good faith; (2) whether the defendants' offer of
judgment was reasonable and in good faith in
8 both its timing and amount; (3) whether the
plaintiff's decision to reject the offer and
9 proceed to trial was grossly unreasonable or in
bad faith; and (4) whether the fees sought by the
offeror are reasonable and justified in amount.

10 After weighing the foregoing factors the district judge
11 may, where warranted, award up to the full amount of fees
12 requested. On the other hand where the court has failed
to consider these factors, and has made no findings based
13 on evidence that the attorney's fees sought are reasonable
and justified, it is an abuse of discretion for the court
to award the full amount of fees requested.

14 Beattie v. Thomas, 668 P.2d 268, 274 (Nev. 1983) (internal citations
15 omitted).

17 III. Discussion

18 Defendant requests attorney's fees in the amount of \$404,573.50
19 incurred from the commencement of this action, or \$10,305.00
20 incurred after its offer of judgment. Defendant argues that
21 Plaintiff's claims against it were brought without the support of
22 credible evidence, and that any delay in resolving Plaintiff's
23 insurance claim is a result of Plaintiff's own actions. Defendant
24 argues that despite the above, it served Plaintiff a reasonable
25 offer of judgment in the amount of \$10,000.00 to settle her extra-
26 contractual claims, which Plaintiff unreasonably rejected.

A. Attorney's Fees Under Nev. Rev. Stat. § 18.010

Nevada Revised Statutes § 18.010(2) provides that when the court finds that a claim is brought or maintained without reasonable ground or to harass the prevailing party, the court may award attorney's fees to a prevailing party. Plaintiff opposes Defendant's request attorney's fees in the amount of \$404,573.50 because it argues that the motion (#109) is premature and there has been no determination that Defendant is a prevailing party. At the time of filing, Defendant's Motion for Attorney's Fees (#109) was filed before judgment was entered and all claims had been disposed of. However, since then, the parties have stipulated to dismiss the one remaining claim of breach of contract. Because Plaintiff opposed Defendant's Motion (#109) on its merits as well as its untimeliness, we shall decide Defendant's Motion (#109) on its merits.

Plaintiff argues that Defendant is not entitled to attorney's fees under Nev. Rev. Stat. § 18.010 because it has not been determined to be the prevailing party. While we granted summary judgment in favor of Defendant on Plaintiff's extra-contractual claims, we agree that Defendant is not in the position of a prevailing party entitled to collect all attorney's fees incurred since the commencement of the action. Plaintiff may have been the prevailing party with respect to the breach of contract claim, and did prevail, at least at the summary judgment stage, in defeating the motion for summary judgment on that claim. However, that does not resolve whether Defendant is entitled to collect fees incurred solely in defending the extra-contractual claims.

1 Defendant claims that Plaintiff essentially combined two
2 separate lawsuits against Defendant in bringing a breach of contract
3 claim along with a tort claim for extra-contractual tort damages.
4 Therefore, Defendant argues it is the prevailing party with respect
5 to those claims, and should be awarded all fees incurred in
6 defending against those claims. Defendant hired a separate law firm
7 to defend against the extra-contractual claims, and therefore, there
8 is no difficulty in separating fees incurred to defend against the
9 breach of contract claim, on which Defendant did not prevail.

10 In order to award the fees, however, we must find that
11 Plaintiff's claims were brought without reasonable ground or to
12 harass the prevailing party. While we granted summary judgment on
13 Plaintiff's extra-contractual claims based on the evidence presented
14 by both parties, we cannot find that Plaintiff's claims were so
15 frivolous and groundless as to require the finding that she should
16 pay for all of Defendant's attorney's fees since the commencement of
17 the action. There is little dispute that Plaintiff had a right to
18 benefits of some amount under her insurance policy. While the Court
19 ultimately determined that Defendant did not owe Plaintiff damages
20 under her extra-contractual claims, we decline to award attorney's
21 fees on the basis that her claims were brought without reasonable
22 ground.

23 **B. Attorney's Fees Under Nev. Rev. Stat. § 17.115 and NRCP 68**

24 Under Nevada law, a party who rejects an offer of judgment and
25 then fails to obtain a more favorable judgment "shall pay the
26 offeror's post-offer costs, applicable interest on the judgment from
27 the time of the offer to the time of entry of the judgment and
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1 reasonable attorney's fees, if any be allowed, actually incurred by
2 the offeror from the time of the offer." NEV. R. CIV. P. 68(f). The
3 court must consider the four Beattie factors to determine whether
4 attorney's fees should be awarded under NRCP 68. Those factors are:

5 (1) whether the plaintiff's claim was brought in good
6 faith; (2) whether the defendants' offer of judgment was
7 reasonable and in good faith in both its timing and
8 amount; (3) whether the plaintiff's decision to reject the
offer and proceed to trial was grossly unreasonable or in
bad faith; and (4) whether the fees sought by the offeror
are reasonable and justified in amount.

9 Beattie, 668 P.2d at 274.

10 On May 26, 2011, Defendant offered Plaintiff \$10,000.00 to
11 settle the extra-contractual claims. Defendant claims that from the
12 time the offer of judgment was served (May 26, 2011) to the time
13 summary judgment was granted on the extra-contractual claims
14 (February 2, 2012), Defendant incurred attorney's fees in the amount
15 of \$10,305.00.

16 The first factor expounded by the Nevada Supreme Court in
17 Beattie requires the Court to determine whether Plaintiff brought
18 her claims in good faith. While we previously found that Plaintiff's
19 claims were not brought without reasonable ground or to harass
20 Defendant, we do note that much of the delay in resolving
21 Plaintiff's insurance claim was a result of her own delay in
22 providing requested medical records. Because of that conclusion, we
23 granted summary judgment in Defendant's favor on the extra-
24 contractual claims. Plaintiff argues that based on the counseling
25 provided by her expert opinion who reviewed the papers and pleadings
26 in her case, she had a reasonable basis to believe that Defendant
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1 was unreasonably delaying the handling of her claim. While we
2 disagree with that conclusion based on our own findings, we cannot
3 find that Plaintiff brought her claims in bad faith.

4 The second factor we must consider in accord with Beattie is
5 whether Defendant's offer was reasonable and in good faith. We find
6 that this factor weighs in Defendant's favor, as Defendant offered
7 \$10,000.00 to settle the extra-contractual claims. While Plaintiff
8 argues because her medical expenses were nearly \$40,000, an offer of
9 \$10,000 was unreasonable, we disagree. By the time Defendant made
10 its offer, discovery was closed and Defendant was in possession of
11 the evidence upon which we found that Plaintiff's extra-contractual
12 claims lacked merit. In light of that evidence, we find that
13 Defendant's offer of judgment was not unreasonable or made in bad
14 faith.

15 The third Beattie factor requires the Court to consider whether
16 Plaintiff's decision to reject the offer of judgment was grossly
17 unreasonable and whether it was in bad faith. The Court concludes
18 that Plaintiff's decision to reject Defendant's offer of judgment
19 was not grossly unreasonable nor was it in bad faith. Plaintiff
20 argues that she relied on an insurance expert, whose reliability we
21 will not discuss, who opined that Defendant unreasonably delayed the
22 handling of her claim and entered into the claims handling process
23 with a predetermined bias against her. While those conclusions are
24 suspect, we cannot find that Plaintiff was grossly unreasonable in
25 relying on the expert opinion to reject the offer of judgment.

26 The fourth and final Beattie factor asks whether the fees
27 sought by Defendant are reasonable and justified in amount.

Pursuant to Nevada law, a trial court should consider the following factors in determining whether a requested amount in attorney's fees is reasonable:

(1) the qualities of the advocate: his [or her] ability, training, education, experience, professional standing and skill; (2) the character of the work to be done: its difficulty, intricacy, importance, the time and skill required, the responsibility imposed and the prominence and character of the parties when they affect the importance of the litigation; (3) the work actually performed by the lawyer: the skill, time and attention given to the work; and (4) the result: whether the attorney was successful and what benefits were derived.

Schouweiler v. Yancey Co., 712 P.2d 786, 790 (Nev. 1985). Based on these factors, we find that the fourth Beattie factor is in favor of Defendant. The requested attorney's fees in the amount of \$10,305.00 since the offer of judgment are reasonable in light of the attorney's experience of fourteen years, an hourly rate of \$250.00, and careful documentation of the work actually performed since the offer of judgment.

Because we find that two factors favor Plaintiff and two factors favor Defendant, we decline to award attorney's fees on the extra-contractual claims.

IV. Conclusion

IT IS, THEREFORE, HEREBY ORDERED that Defendant's Motion for Judgment (#116) pursuant to FRCP 54(b) is **DENIED** as moot.

IT IS FURTHER ORDERED that Defendant's Motion for Attorney's Fees (#109) is **DENIED**.

1 The parties' Stipulation and Order for Dismissal (#122) shall
2 be granted by separate order.

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5 DATED: May 16, 2012.

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7 UNITED STATES DISTRICT JUDGE
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